

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD LOPEZ,)	
)	
Petitioner,)	No. 2:03-cv-1027-JKS-EFB-P
)	
vs.)	
)	
GAIL LEWIS, Warden,)	<u>DECISION</u>
)	
Respondent.)	
)	
)	
)	

Petitioner, a state prisoner proceeding *pro se*, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to the Honorable Edmund F. Brennan, United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On January 19, 2007, the magistrate judge filed Findings and Recommendations herein which were served on all parties and which contained notice to all parties that any objections to the Findings and Recommendations were to be filed within twenty days. Petitioner has filed objections (Docket No. 18) to the Findings and Recommendations and Respondent has filed a reply (Docket No. 19).

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this Court has conducted a *de novo* review of the record and exercised its independent judgment. The Court has carefully considered petitioner's objections. Having carefully reviewed the entire file, the Court finds the Findings and Recommendations to be supported by the record and in

conformity with controlling law. The Court therefore adopts the findings and accepts the recommendations. A few additional remarks are in order.

Petitioner has requested appointment of counsel. Judge Brennan considered the request and denied it, concluding that the interests of justice would not be served by the appointment of counsel at this stage of the proceedings. Order at Docket No. 25. The Court has considered the issue and agrees that the record does not warrant the appointment of counsel. The issues are simple and fully covered by existing law. There is no need for an evidentiary hearing.

Petitioner seeks to dismiss his Petition without prejudice. Docket No. 24. Since Respondent has filed a response, the Magistrate Judge has issued findings of fact and recommendations, and Petitioner has not obtained a stipulation for dismissal, dismissal must be by leave of court. *See* FED. R. CIV. P. 41(a)(2). Petitioner seeks dismissal in order to cure deficiencies noted by Respondent and the Magistrate Judge. Respondent contended in part that some issues were not exhausted and others were procedurally barred by independent state grounds. The Magistrate Judge rejected these arguments, however, found all issues exhausted and none procedurally barred. This Court agrees that each contention should be addressed on its merits. There is therefore nothing to cure.¹ The motion for leave to dismiss without prejudice will therefore be denied.

¹ It is true that the Magistrate Judge found a number of Petitioner's claims forfeited for failure to argue them in the briefing. The Court has reviewed Petitioner's objections to the Magistrate Judge's recommendations at Docket No. 18, and his Petition to Amend Supplemental Pleadings at Docket No. 23. It is perhaps true that many of these new claims are not exhausted. In the exercise of its discretion, the Court declines to permit dismissal without prejudice at this late stage in the litigation. *See* FED. R. CIV. P. 41. In reaching this conclusion, the Court has considered petitioner's *pro se* status.

The only possible conclusion on this record is that Petitioner received the process that was due in the state courts, and that the decisions of the state courts did not violate clearly established federal law as determined by the holdings of the decisions of the United States Supreme Court.

IT IS THEREFORE ORDERED:

1. The Findings and Recommendations filed January 19, 2007, are adopted in full; and
2. Petitioner's application for a writ of habeas corpus is **DENIED**;
3. The motion for leave to dismiss without prejudice at Docket No. 24 is **DENIED**;
4. The Clerk shall enter judgment dismissing the petition with prejudice;
5. The Court has considered whether to issue a certificate of appealability as to one or more issues and concludes that as to all of Petitioner's claims there has been no showing of the denial of a constitutional right. 28 U.S.C. § 2253(C). No certificate of appealability will therefore be issued.

Dated this 26th day of September 2007.

/s/James K. Singleton, Jr.
JAMES K. SINGLETON, JR.
UNITED STATES DISTRICT JUDGE